

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

PENNER V. PENNER

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AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

KEVIN PENNER, APPELLEE,

V.

JANA PENNER, APPELLANT.

Filed April 6, 2010. No. A-09-630.

Appeal from the District Court for Hamilton County: MICHAEL J. OWENS, Judge.
Affirmed.

John W. Ballew, Jr., and Natalie S. Hazen, of Ballew Covalt, P.C., L.L.O., for appellant.

William G. Dittrick and Lindsay K. Lundholm, of Baird Holm, L.L.P., for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jana Penner appeals an amended decree, among other things, dissolving her marriage to Kevin Penner, calculating and dividing the marital estate, and awarding her alimony. On appeal, Jana asserts as error the court's exclusion of stock from the marital estate, failure to rule on the admissibility of expert testimony proffered by Jana, failure to make a sufficient estate equalization award, and failure to award sufficient alimony. We find no merit to any of these assertions, and we affirm.

II. BACKGROUND

The parties were married in 1991. On February 4, 2008, Jana filed a complaint for dissolution. On March 13, 2008, Kevin filed an answer and counterclaim.

The evidence adduced during trial indicated that Lee Penner, Kevin's father, began working as an independent distributor for a bathing system company in Aurora, Nebraska, approximately 30 years ago. Lee incorporated a business known as Penner Patient Care Systems.

Penner Patient Care Systems was in existence for approximately 15 to 17 years and was owned 100 percent by Lee. In 1997, Lee incorporated two companies, Penner Manufacturing and Penner Patient Care, to conduct manufacturing and sales of bathing systems, respectively.

Lee testified that his intention with the businesses was not only to conduct business, but also to make sure that his estate was organized properly, and he wanted to have his three children (Kevin and his brother and sister) to “have” Penner Manufacturing. As a result, he intended to give them ownership of Penner Manufacturing through gifts of stock.

In March 1998, original issues of stock in Penner Manufacturing were made in the names of Lee, Lee’s wife, Kevin, Kevin’s brother, and Kevin’s sister. Lee and his wife were each issued 2,600 shares, and Kevin and his siblings were each issued 1,600 shares. In conjunction with this issuance of 1,600 shares to Kevin, Kevin signed a subscription agreement indicating that he “agree[d] to pay to [Penner Manufacturing] the sum of \$1,600.00 cash or its equivalent, plus services rendered, at such times as shall be determined by the Board of Directors of [Penner Manufacturing].” Although the evidence is unclear, it appears that Kevin at some point actually did pay Penner Manufacturing \$1,600. Regardless, in January 2001, the initial issuance of 1,600 shares of stock each to Kevin and his siblings was canceled and Kevin received a check for \$1,600 reimbursement.

In 1999, Kevin and his siblings each received an additional issuance of 1,400 shares of stock in Penner Manufacturing. Lee testified that those shares were a gift to Kevin and that Kevin never paid any money for them. In 2001, after the initial issuances were canceled, each of the siblings received an issuance of an additional 600 shares of stock in Penner Manufacturing. Lee testified that there was no subscription agreement associated with that issuance. There is no evidence that Kevin paid any money for them.

With respect to Penner Patient Care, the record indicates that in August 2001, Lee, his wife, and each of the three siblings received an initial issuance of stock. Lee and his siblings each received an issuance of 3,000 shares. In conjunction with this issuance of stock, Kevin signed a subscription agreement wherein he agreed “to pay [Penner Patient Care] the sum of \$300 cash or its equivalent, plus services rendered, at such times as shall be determined by the Board of Directors of [Penner Patient Care].” Kevin testified that he never gave Penner Patient Care any money for those shares. Lee testified that Kevin never wrote a check to Penner Patient Care for \$300 and that Lee never required him to perform any services for any of the stock given to him in Penner Patient Care.

Kevin testified that Penner Manufacturing and Penner Patient Care are both subchapter S corporations and that the corporations do not pay taxes on whatever income the corporations earn, but, rather, that the shareholders are obligated to pay the income taxes. The books for Penner Manufacturing and Penner Patient Care include entries showing “accounts payable - shareholders - Kevin” as long-term liabilities. In 2007, this entry was over \$155,000 for Penner Manufacturing and over \$22,000 for Penner Patient Care. Kevin testified that this represented the amount of each company’s income that was attributed to his shares for each company, but was not money that was actually ever distributed to him or any other shareholder. This represented the amount of each company’s income that Kevin was responsible for paying income taxes on. Lee testified that the money could not be distributed to shareholders and that there were no plans to make distributions of the money. The accountant for the companies testified that there were no

promissory notes to the shareholders or any other written contracts or agreements indicating that the companies actually owed any of the money to the shareholders.

At trial, Jana proffered the testimony of Michael Hershberger as an expert witness, who testified about his opinions of the fair market values of Penner Manufacturing and Penner Patient Care. Kevin renewed a motion in limine challenging the admissibility of Hershberger's testimony and opinions. The court noted the objections and took the admissibility of Hershberger's testimony under advisement.

On June 17, 2009, the court entered an amended decree in which the court, among other things, dissolved the parties' marriage, distributed the marital estate, and awarded alimony. The court found that the shares of stock were gifts and not properly part of the marital estate, concluded that there was no need to determine the values of the companies, held that the nondispersed income was not a marital asset, awarded an equalization payment of \$4,000, and awarded Jana alimony in the amount of \$1,000 per month for a period of 8 years. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Jana has assigned five errors. First, Jana asserts that the district court erred in failing to include in the marital estate Kevin's shares of stock in Penner Manufacturing and Penner Patient Care. Second, Jana asserts that the court erred in failing to rule on the admissibility of Hershberger's testimony and opinions about the value of the companies. Third, Jana asserts that the court erred in failing to find the accounts receivable for company income were assets that should be included in the marital estate. Fourth, Jana asserts that the court erred in failing to award a sufficient estate equalization payment. Finally, Jana asserts that the court erred in failing to award a sufficient amount of alimony.

IV. ANALYSIS

1. SHARES OF STOCK

Jana first challenges the district court's conclusion that the stock Kevin holds in the two companies is not properly included in the marital estate. The court concluded that the evidence demonstrated that the stock was a gift, and not a marital asset. We agree.

Jana correctly notes the basic applicable propositions of law that guide our analysis of this issue. An equitable division of marital property under Neb. Rev. Stat. § 42-365 (Reissue 2008) is a three-step process. First, the court must classify the parties' property as either marital or nonmarital. See *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000). As a general rule, all property acquired and accumulated during the course of the marriage is considered part of the marital estate, unless it falls within a recognized exception to the general rule. See *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). One of those exceptions is that property received through gift or inheritance is excluded from the marital estate. *Id.* The burden of proving that property should be excluded from the marital estate because it was received by gift is on the party seeking to exclude the property from the marital estate. *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999).

Jana goes to great lengths in her brief on appeal to note that some of the stock issued to Kevin was part of an initial issuance of stock from the corporations, while others were transfers

of shares from Kevin's parents. While we agree that the record indicates that there were these two different types of transfers, Jana misconstrues the significance of the dichotomy.

While it is true that, as Jana asserts, there is evidence that Kevin initially received 1,600 shares of stock in Penner Manufacturing and that, as the district court found, Kevin paid money for those shares, the record also indicates that those shares were canceled and the payment was returned to Kevin. With respect to the shares of stock in Penner Manufacturing and Penner Patient Care that Kevin owned at the time of trial, the evidence at trial consistently demonstrated that he did not pay for any of the shares and that the shares were all gifts from Kevin's father, Lee, who incorporated the two companies and used the stock in the two companies as a means of distributing his estate. Lee testified that all of the stock was a gift. There was no contradictory evidence adduced. As a result, we find no merit to Jana's assertion that the court erred in not including in the marital estate Kevin's stock in these two companies.

2. HERSHBERGER'S TESTIMONY

Jana next asserts that the district court erred in not finding that Hershberger's testimony concerning the valuation of the two companies was admissible. As noted above in the factual background portion of this opinion, the court took the objections to the testimony under advisement and in the decree concluded that it was unnecessary to address the valuation of the companies. In light of our resolution of the previous assignment of error finding that the stock in the two companies was nonmarital property, we agree with the district court that it is unnecessary to address Hershberger's opinions concerning the valuation of the two companies.

3. NONDISPERSED INCOME

Jana next asserts that the district court erred in not considering as marital assets the nondispersed income listed on the companies' financial statements as long-term liabilities. The court concluded that the amounts were simply undistributed profits of the two corporations and should not be considered marital assets, especially because of Kevin's status as a minority shareholder in the corporations with no say in whether the money is ever distributed. We agree.

The evidence adduced at trial uniformly indicated that the classification on the financial statements of these amounts as "accounts payable" was merely a label placed on them by the accountant for purposes of balancing the balance sheets. The amounts were simply a way of indicating each shareholders' "portion" of the corporations' income for purposes of calculating the shareholders' obligations with respect to income tax. The testimony indicated that there were no promissory notes or other contractual obligations to pay the money out to shareholders, nor were there any plans in the foreseeable future to do so. The testimony indicated that the only moneys actually paid out to shareholders were limited to moneys necessary for each shareholder to pay his or her share of income taxes on the corporate earnings, and did not constitute any actual disbursement of income to shareholders. Indeed, the testimony indicated that paying this nondispersed income to shareholders would place the corporations in financial difficulty. We find no merit to Jana's assertions on appeal.

4. EQUALIZATION PAYMENT

Jana next asserts that the district court should have awarded her some kind of an award under the authority of *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986). We agree with Kevin that the facts and circumstances of the present case do not support a *Grace* award.

In *Grace v. Grace*, *supra*, the Nebraska Supreme Court was confronted with a somewhat unusual factual circumstance where the parties were married for 16 years, but during the marriage primarily lived off the husband's inherited property and the family's closely held business. As a result, the parties did not earn any significant income, did not own a marital home, and did not accumulate any marital estate. The parties lived in a home owned by the family corporation, used the company checkbook to pay for living expenses, and received payment of utilities, vehicles, and other expenses all from the business. The wife was not employed and considered herself a "ranch wife." *Id.* at 698, 380 N.W.2d at 283. As a result, after 16 years of marriage, there was virtually no marital estate.

In the present case, although Kevin also was employed by a family business, the record indicates that he received an actual salary that Jana asserts on appeal was approximately \$80,000 per year at the time of trial and which, along with Jana's average income of approximately \$20,000 per year, was used for living expenses. The parties owned a marital home which was sold and from which each party received approximately \$17,000. Each of the parties in the present case received some personal property, and each received an automobile from the marital estate. The parties in this case had the opportunity to acquire a more significant marital estate, and their failure to do so was not because any earnings were poured back into the family business. As such, we do not find the present case comparable to *Grace v. Grace*, *supra*, and we find no merit to Jana's assertions on appeal.

5. ALIMONY

Finally, Jana asserts that the court erred in awarding her an insufficient alimony award. We find no abuse of discretion in the court's award.

Section 42-365 sets forth the basic principles governing alimony awards. According to that statute, the court may order alimony as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, and interruption of personal careers or educational opportunities.

On appeal, Jana argues that the alimony award of \$1,000 per month does not afford her sufficient income, when coupled with her earnings as a massage therapist, to fully cover her modest monthly expenses. Jana's argument on appeal does not seem to concern the length of the alimony award. This is notable, because at trial Jana was specifically asked what she was requesting as an alimony award and she replied, "[a]t least a thousand dollars," and indicated that she was requesting that amount for "ten years." Instead of receiving that amount for 10 years, she received \$1,000 for 8 years. In light of the parties' 16-year marriage, the modest marital estate, and the circumstances of the parties as a whole, we do not find the amount of alimony awarded to be an abuse of discretion.

V. CONCLUSION

We find no merit to Jana's assertions on appeal. We affirm the district court's amended decree.

AFFIRMED.